Supreme Court, U.S.
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No. 03-244

In The

Supreme Court of the United States

DAIWA SECURITIES AMERICA, INC.,

Petitioner,

v.

FRED KAYNE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS FRED KAYNE, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED[1]

Does the Private Securities Litigation Reform Act ("PSLRA") apply to claims being asserted in an action filed prior to its effective date, December 22, 1995?

[1] Plaintiffs-Respondents Fred Kayne, et al ("Plaintiffs") are responding only to the second of two questions raised before this Court by Petitioner Daiwa Securities America, Inc. ("Daiwa"), but understand that Defendant-Respondent BDO Dunwoody is filing an opposition addressing both questions raised by Daiwa.

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Plaintiffs-Appellees (Respondents before this Court): Fred Kayne; Stephen Kayne; Milton T. Okun; Rosemary Okun; Merrill, Lynch, Pierce, Fenner & Smith, Inc., as Custodian for Milton T. Okun Individual Retirement Accounts; Don Wohl; Glen Tobias; Ken Berg; Robert A. Bronstein; Bronstein Family Trust; Bruce Burnam; Marcia Burnam; Kathleen A. Cohen; William Corbett; Cutler Family Trust of 1989; Martin Goldfarb, M.D.; Richard Gunther; Harpel Partners, L.P.; Harpel Wheelock Partners, L.P.; Harpel International, Ltd.; Richard L. Milsner; Joel Rumm, D.M.V.; Victor Scaravilli; Tri S Partners; Dreiländer Beteiligung Objekt DLF 93/14-Walter Fink-KG, a Limited Partnership Formed under the Laws of Germany; and Zwölfte Dreiländer Beteiligung DLF 92/12-Walter Fink-KG, a Limited Partnership Formed under the Laws of Germany.

2. Defendant-Appellee (Respondent before this Court): BDO Dunwoody LLP.

3. Third Party Defendant-Appellee: HSBC Bank Canada.

4. Defendant-Appellant (Petitioner before this Court): Daiwa Securities America Inc.

5. Defendants-Appellants: MTC Electronic Technologies Co., Ltd. (n/k/a GrandeTel Technologies, Inc.); Edilberto Pozon; Peter Jensen; Thomas Lenagh; Robert Farr; Ugo Doninelli; David Wong; and Goodwin Wang.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, nominal respondent Merrill, Lynch & Co., Inc. is a corporation whose stock is not owned at a 10% or greater level by any publicly held company.

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	iii
COUNTER-STATEMENT OF THE CASE	1
A. BACKGROUND OF THE ACTION	1
B. BACKGROUND OF THE PARTIAL SETTLEMENTS AND PROCEDURAL HISTORY	2
REASONS FOR DENYING THE PETITION	3
THE PSLRA DOES NOT APPLY HERE	5
CONCLUSION	7

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Adler v. Berg Harmon Associates, 790 F.Supp. 1235 (S.D.N.Y. 1992) 4

Albrecht v. U.S., 329 U.S. 599 (1947) 3

American Pipe Constr. Co. v. Utah, 414 U.S. 538 (1974) 7

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) 5

Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983) 7

Dunn v. Immigration & Naturalization Service, 419 U.S. 919 (1974) 3

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) 3

Hughes Aircraft Co. v. United States Ex Rel. Schumer, 520 U.S. 939 (1997) 6, 7

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 6, 7

McKowan Lowe & Co. v. Jasmine, Ltd., 976 F.Supp. 293 (D.N.J. 1997) 4

Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956) 3

Watt v. Alaska, 451 U.S. 259 (1981) 4

FEDERAL STATUTES

PSLRA ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 3 6
FRCP 20 5
FRCP 21 5

COUNTER-STATEMENT OF THE CASE

A. BACKGROUND OF THE ACTION

Plaintiffs are a group of open-market purchasers who lost more than $15 million investing in MTC Electronic Technologies Co. Ltd. ("MTC") between 1992 and 1994. In the face of allegations of fraud at MTC, Daiwa assured the investing public that MTC indeed had legitimate telecommunications joint ventures in China, and underwrote a $70 million public offering. Eventually, MTC admitted fraud with respect to (1) the theft of MTC stock and below-market stock options purportedly issued to engineers for China telecommunications joint ventures, and (2) falsely reported sales of fax machines in China during the 1991, 1992 and 1993 fiscal years. The purported China telecommunications joint ventures were all written off by 1997.

Various class action litigation was filed against MTC, Daiwa and others in 1993 and 1994. This action, on behalf of opt outs of the class actions, was filed January 23, 1995 in U.S. District Court for the Central District of California against MTC, Daiwa and others and includes claims for federal securities fraud, common law fraud and RICO violations. This action was transferred to the Eastern District of New York in 1995 by the Judicial Panel on Multidistrict Litigation ("JPML") for coordinated discovery proceedings with the MTC class action litigation. Additional plaintiffs joined this action by amendment in 1996 and 1997. Daiwa originally opposed the addition of those new plaintiffs, but ultimately withdrew its opposition after those new plaintiffs filed an action in California state court asserting state law claims and Daiwa needed to justify its request that a stay be imposed in the state court proceeding.

Plaintiffs have been struggling for most of the last eight plus years to have this case remanded to the Central District of California for trial on the merits. Although the class action litigation settled in 1997 and the class action settlement was approved by the district court in 1998, this case remains in the Eastern District of New York. Discovery has concluded, and summary judgment motions by the non-settling defendants, including Daiwa, were denied in 2002.

B. BACKGROUND OF THE PARTIAL SETTLEMENTS AND PROCEDURAL HISTORY

In late 2000, after almost six years of litigation and unsuccessful efforts to reach a global settlement, Plaintiffs agreed to partial settlements with MTC's auditor, defendant-respondent BDO Dunwoody, and third-party defendants HSBC Canada and Ron Driol. The two settlements totaled slightly over $12 million, with portions allocated to prejudgment interest (available for federal securities fraud and California common law fraud) and attorneys fees (available for RICO violations). Although Daiwa's purported "damages" expert estimated Plaintiffs' total out-of-pocket damages at $3,352,690 even if liability was established, Daiwa and the other non-settling defendants nonetheless opposed the settlements and related bar orders on numerous grounds. Among other things, Daiwa argued that the PSLRA applied to the claims of the later-added plaintiffs, which Daiwa claimed impacted the bar orders and judgment reduction rules. Magistrate Judge Chrein (on April 24, 2001), U.S. District Judge Gleeson (on November 1, 2001) and the Second Circuit Panel (on May 15, 2003) unanimously rejected Daiwa's contention that the PSLRA applied to any aspect of this pre-enactment

action. The Second Circuit noted the critical distinction between a "claim" and an "action," and ruled that an "action" is commenced when the complaint is filed. The Second Circuit remanded to the district court for further proceedings related to the issue of whether the bar order issued in connection with the BDO Dunwoody settlement should be mutual or non-mutual as to the non-settling defendants under pre-PSLRA law. The briefing on that issue has now been completed, but no decision has yet been rendered by Judge Gleeson.

REASONS FOR DENYING THE PETITION

This is a particularly inappropriate case for certiorari, given that Daiwa's complaints regarding application of the PSLRA are unlikely to ever recur. *Dunn v. Immigration & Naturalization Service*, 419 U.S. 919 (1974) (Stewart, J., dissenting) (normally appropriate to deny review when legal questions raised unlikely to recur). Thankfully there are not a lot of securities fraud cases still pending in the federal system that were filed prior to December 22, 1995. Accordingly, any ruling regarding the applicability of the PSLRA to the plaintiffs added to this pre-existing action at a later date is extremely unlikely to ever impact any future case. *Cf. Albrecht v. U.S.*, 329 U.S. 599 (1947) (certiorari granted because issue of widespread importance). Resolution of the issue will not affect any interest broader than the parties to this particular case. *Cf. Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) (certiorari appropriate where issue involved is of broad application), superseded by statute on other issues as stated in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

There is no conflict among the circuits as to the temporal reach of the PSLRA. *Watt v. Alaska*, 451 U.S. 259 (1981) (Stevens, J. concurring) (certiorari inappropriate where no reason to believe comparable issue will arise in another Circuit in foreseeable future). The only other court to consider the issue of parties added to an action filed before the PSLRA's effective date, *McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F.Supp. 293 (D.N.J. 1997), ruled the same way as the Second Circuit did here. Although Daiwa tries to limit that holding to the PSLRA's stay on discovery, the district court in that case, like the court of appeals in this case, considered the effects of the Act in its entirety in correctly determining not to apply it to later-added parties in a pre-enactment action.

The only case with a contrary holding about the meaning of "action" as opposed to "claim" in *any* context cited by Daiwa is *Adler v. Berg Harmon Associates*, 790 F.Supp. 1235 (S.D.N.Y. 1992), a district court decision within the Second Circuit. Unlike the Second Circuit's thoughtful opinion in this case, the district court in that case assumed, without any analysis, that "claim" and "action" are synonymous.

Most fundamentally, however, the Second Circuit was clearly correct. Congress knows the difference between "claims" and "actions", and chose to exempt entire actions pending as of December 22, 1995 from the PSLRA's reach, rather than limiting the reach of the exemption to only "claims" pending as of that date.

Further, there are numerous other reasons presented to the Second Circuit and the district court in this case that were not expressly ruled upon which would likewise justify a determination that the PSLRA did not apply here,

above and beyond the express statutory language barring its application to entire pre-enactment "actions." Thus, even if certiorari were granted and the Second Circuit opinion reversed, there very likely would not be any change in the outcome of *this* case, putting aside the lack of widespread importance of the issue raised.

Finally, certiorari is inappropriate on Daiwa's Question Presented 2(b) in any event, because the Second Circuit remanded to the district court to readdress the issue of the mutuality of the bar order. That issue is thus not yet ripe for this Court's consideration even if certiorari were otherwise appropriate; if the district court decides the bar order must be mutual, Daiwa's arguments on this point would be moot.

THE PSLRA DOES NOT APPLY HERE

Section 108 of the PSLRA, the text of which is set forth in Daiwa's Petition, by its terms provides that the PSLRA "shall not affect or apply to any private *action* arising under Title I of the Securities Exchange Act of 1934 . . . commenced before and pending on the date of enactment of this Act." (Emphasis added.)

As in all statutory construction cases, if the statutory language is plain and unambiguous, the inquiry ceases. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). The Federal Rules of Civil Procedure themselves distinguish between an "action" – referring to all parties – and each party's assertion of separate rights, which is termed a "claim." Compare FRCP 20 ("all persons may join in one action as plaintiffs") and FRCP 21 (any claim against the party may be severed and proceeded with separately).

FRCP 3 provides that an "action is commenced by filing a complaint with the court." As the Second Circuit noted, "(a)mending the complaint, even to add additional plaintiffs, did not create a new action." (Petition for Writ of Certiorari, p. 26a.)

In fact, Daiwa could have claimed "prejudice" in opposing the motion to add the new plaintiffs on the ground that those plaintiffs might otherwise be subject to the PSLRA. Instead, Daiwa ultimately agreed to the amendments (to serve its own litigation strategy in justifying its request for a stay of related state court proceedings in California) joining all plaintiffs in one action, preserving the new plaintiffs' rights under the specific wording of section 108 of the PSLRA. Daiwa should not now be permitted to complain about the result it created.

Moreover, there are other reasons presented to the courts below (but not ruled on) that would also compel the non-application of the PSLRA to this case. While Plaintiffs believe the distinction between a claim and an action to be clear and dispositive of this issue, to the extent it could be argued that it is ambiguous whether Congress intended the Act to apply to later-asserted claims in pre-enactment actions, the analysis used in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *Hughes Aircraft Co. v. United States Ex Rel. Schumer*, 520 U.S. 939 (1997) would preclude retroactive application of the PSLRA to the claims of the later-added plaintiffs in this action based on conduct occurring before its effective date. Applying the PSLRA to the claims of the later-added plaintiffs would clearly have a retroactive effect, since various subsections of the PSLRA, beyond those related to bar orders, for the first time limit joint and several liability and responsibility for uncollectible shares of judgments. This would

remove many of the legal consequences that attach to the perpetration of securities fraud. A change in the kind or measure of damage can be enough to create a retroactive effect. *Landgraf*, 511 U.S. at 282-3; *Hughes Aircraft*, 520 U.S. at 947-8.

Additionally, in practical terms there would be tremendous jury confusion in applying different rules to different plaintiffs in the same action. As the Second Circuit noted, "we doubt that Congress intended that courts would apply different sets of substantive and procedural rules to groups of identical claims in a single action, depending on when those plaintiffs were added to the complaint." (Petition for Writ of Certiorari, p. 26a.)

Further, since there was class action litigation against Daiwa based on its role in the MTC fraud pending when the PSLRA was enacted, the tolling principles set forth in *American Pipe Constr. Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983) would preclude application of the PSLRA to this action. The purpose of *American Pipe* tolling is to discourage other class members from filing separate actions. If a plaintiff's substantive rights could be adversely impacted by changes in law while a class action is pending, that incentive would be destroyed. Such a result cannot be created in the absence of the clearest Congressional intent.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for certiorari. The Second Circuit correctly determined that the PSLRA did not apply to this action. After eight and a half years of litigation, Plaintiffs

should finally be allowed to present their claims at trial to a jury.

Dated: September 12, 2003

Respectfully submitted,

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